

Montana State Legislature

2013 Session

ADDITIONAL DOCUMENTS MAY INCLUDE THE FOLLOWING:

- **Business Report**
- **Roll Call – Attendance**
- **Standing Committee Reports**
- **Tabled Bills**
- **Fiscal Reports etc.**
- **Roll Call Votes**
- **Informational Items**
- **Witness Statements**
- **Any Documents; such as;**
 - ***Petitions if any.**
 - ***Any and all material handed end after the meeting ends.**

**The original is on file at the
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BUSINESS REPORT

**MONTANA SENATE
63rd LEGISLATURE - REGULAR SESSION**

SENATE NATURAL RESOURCES COMMITTEE

Date: Monday, March 11, 2013

Place: Capitol

Time: 3:00 PM

Room: 422

BILLS and RESOLUTIONS HEARD:

HB 37 - Allow temporary leasing of water rights - Rep. Bill McChesney

HB 106 - Generally revise water use laws - Rep. Pat Connell

EXECUTIVE ACTION TAKEN:

Comments:

HB 128 - Being re-scheduled



SEN. Chas Vincent, Chair

MONTANA STATE SENATE
Roll Call
NATURAL RESOURCES COMMITTEE

DATE: 3-11-13

<u>NAME</u>	<u>PRESENT</u>	<u>ABSENT/ EXCUSED</u>
SENATOR CHAS VINCENT, CHAIR	✓	
SENATOR JOHN BRENDEN, VICE CHAIR	✓	
SENATOR DEBBY BARRETT	✓	
SENATOR JENNIFER FIELDER	✓	
SENATOR BRAD HAMLETT	✓	
SENATOR VERDELL JACKSON	✓	
SENATOR CHRISTINE KAUFMANN		Excused
SENATOR JIM KEANE		Excused
SENATOR CLIFF LARSEN	✓	
SENATOR MIKE PHILLIPS	✓	
SENATOR RICK RIPLEY	✓	
SENATOR MATTHEW ROSENDALE		Excused
SENATOR MITCH TROPILA	✓	
SENATOR ED WALKER		Excused

MONTANA STATE SENATE

Visitors Register

SENATE NATURAL RESOURCES COMMITTEE

Monday, March 11, 2013

HB 37 - Allow temporary leasing of water rights

Sponsor: Rep. Bill McChesney

PLEASE PRINT

[illegible]

Please leave prepared testimony with Secretary. Witness Statement forms are available if you care to submit written testimony.

MONTANA STATE SENATE

SENATE NATURAL RESOURCES COMMITTEE

Monday, March 11, 2013

HB 106 - Generally revise water use laws

Sponsor: Rep. Pat Connell

PLEASE PRINT

[illegible]

Please leave prepared testimony with Secretary. Witness Statement forms are available if you care to submit written testimony.

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March 7, 2013

Chairman Chas Vincent
Senate Natural Resources Committee
Montana Senate
Capitol Building
PO Box 200400
Helena, MT 59620-0400

RE: House Bill 106
Our file no: 66060\001

Dear Mr. Chairman and Members of the Committee:

I am writing to urge you to vote against HB 106.

I practice law in Bozeman where I specialize in water rights and water right adjudication issues. About 90 percent of my practice involves water rights. Prior to joining the Moore Law Firm in 1999, I was employed as a Water Master at the Montana Water Court from 1991 through 1998.

Water rights in Montana are valuable property rights protected by Article IX, Section 3 of the Constitution. Protection of vested rights to the use of water, and the lawful exercise of those rights has always been under the jurisdiction of our district courts. Accordingly, when the Department of Natural Resources and Conservation (DNRC) seeks to enforce the Water Use Act, the Act currently requires DNRC to bring an action in district court.

In my experience, many enforcement actions brought by DNRC involve actions against water users with valid water rights. Such actions often involve legal issues concerning whether the use by a particular water user has exceeded the scope of his or her water right. In these cases, the DNRC and the water user often have different views as to the scope and extent of the particular water right at issue. Historically, these different views and interpretations have been settled by the district courts.

The amendments to the Judicial Enforcement statute § 85-2-114, MCA contained in HB 106 are a bad idea because the amendments give the DNRC powers that infringe upon the jurisdiction of the district courts to supervise water distribution under § 85-2-406. The proposed amendments give DNRC powers far beyond the scope of those delegated in § 85-2-113, MCA. Specifically, proposed new subsection (2) gives DNRC administrative authority to act as prosecutor, judge and jury concerning alleged violations of the Water Use Act.

Additional doc.
HB 106
NOT REC'D
3-11-13 (Monday)

Chairman Chas Vincent
March 7, 2013
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The amendments eliminate the traditional burden placed on DNRC of proving that a water user is in violation of the Water Use Act. Rather, the amendments place the burden on Water Users to prove to DNRC's satisfaction before a DNRC hearing examiner in a DNRC administrative hearing that a water user is not in violation of the Act. Rather than having to enforce its interpretation of the Act and seek injunctive relief before a neutral district court judge, DNRC may choose to simply issue an "administrative order" under subsection (2)(a) that may become final under subsection (2)(d) and have the effect of restraining the exercise of constitutionally protected property rights without a hearing. Depriving a water user of the exercise of a water right and imposing fines without a hearing violates the fundamental right of due process guaranteed by Article II, Section 17 of our Constitution.

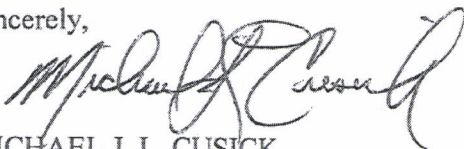
Disputes on the creek between water users have always been resolved through the district court and water commissioners appointed by the district court. Under the proposed legislation, a party can choose to avoid district court by filing a complaint against a neighbor with the DNRC and ask DNRC to initiate enforcement proceedings. This will likely result in forum shopping and the possibility of inconsistent determinations by the district court and the DNRC through its "administrative orders."

Additionally, subsection 1 as written violates the separation of powers because it proposes to legislatively modify the Montana Rules of Civil Procedure. Only the Supreme Court has authority to adopt procedural rules for courts. See *Coate v. Omholt*, 203 Mont. 488, 504, 662 P.2d 591, 600 (1983); *In re Formation of East Bench Irr. District*, 344 Mont. 184, 186 P.3d 1266 (2008). An action for injunctive relief is a regular civil action governed by the rules of civil procedure. Rule 2, M.R.Civ. P. Proposed subsection (1)(c) would require a district court to hold a hearing on a complaint within ten business days. This is prior to the time allowed the defendant to even answer the complaint, which is 21 days under the Rules of Civil Procedure. Rule 12(a)(1)(A), M.R.Civ.P. Proposed subsection (1)(c) violates the separation of powers by legislating court rules, and purports to create court rules that are inconsistent with the rules of civil procedure. This subsection is ill-conceived, inconsistent with civil practice, and not likely to withstand a legal challenge.

HB 106 represents a significant departure from how water right laws are currently enforced. Enforcing the Water Use Act while protecting the lawful exercise of valuable property rights so essential to Montana's historical development and future economic growth has always been the province of the Courts. There does not appear to be a compelling reason for changing those protections.

I urge you to reject HB 106. Thank you for your consideration.

Sincerely,



MICHAEL J. L. CUSICK

MJLC/smk
00019023.WPD